

EXHIBIT

81

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: :
: Master File No.
Global Brokerage, Inc. : 1:17-cv-00916-RA
F/k/a FXCM, Inc. :
Securities Litigation :
----- :

CONFIDENTIAL

REMOTE VIDEO DEPOSITION OF:

DROR NIV

THURSDAY, FEBRUARY 11, 2021

REPORTED BY:

SILVIA P. WAGE, CCR, CRR, RPR

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2 Q. And you no longer have that license;
3 is that correct?

4 A. No.

5 Q. And when did you give up or lose or
6 no longer have that license?

7 A. When I left FXCM in '17.

8 Q. Okay. Were you required to give up
9 that license?

10 A. Yes.

11 Q. Was that by the CFTC?

12 A. If anybody also leaves -- you know,
13 for the record, anybody who leaves the financial
14 service company, it expires anyway.

15 Q. Okay. Thanks for clarifying.

16 Do you have any experience working in
17 the accounting field?

18 A. No.

19 Q. Mr. Niv, were you one of the founders
20 of FXCM?

21 A. Yes.

22 Q. And when did you found FXCM?

23 A. July 1999.

24 Q. And where did you work immediately
25 prior to founding FXCM?

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2 Q. Okay. Was there a time when FXCM
3 created a company called FXCM Inc.?

4 A. Yes.

5 Q. And was that a public company?

6 A. Yes.

7 Q. And is it accurate to describe the
8 corporate structure of FXCM as FXCM Inc., being
9 the parent public company and under FXCM Inc.,
10 was FXCM Holdings, which was not a public
11 company, and then under FXCM Holdings were
12 various regulated entities including Forex
13 Capital Markets LLC?

14 A. No. So FXCM Inc., was a public
15 company. FXCM Holdings was a private company
16 that was under --

17 THE STENOGRAPHER: I'm sorry, under
18 what?

19 A. (Continuing.) Under the public
20 company, under FXCM.

21 Q. Yes, that's right. Sorry if -- I
22 think that was --

23 A. And FXCM Holdings held all the
24 regulated subsidiaries.

25 Q. Okay. And FXCM Holdings was not a

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2 regulated entity; is that right?

3 A. Correct.

4 Q. Okay. And starting with Forex
5 Capital Markets LLC, have you ever referred to
6 that company as FXCM US?

7 A. Correct.

8 Q. Alright. And so, if I refer today to
9 FXCM US, you will understand that to mean Forex
10 Capital Markets LLC?

11 A. Yes.

12 Q. And if I refer to FXCM Holdings LLC
13 as FXCM Holdings, will you understand that
14 connection?

15 A. Yes.

16 Q. Okay. What was your role at Forex
17 Capital Markets LLC starting when you founded the
18 company?

19 A. I was the CEO.

20 Q. And did you have any different roles
21 at the company between when you founded it and
22 when you left, specifically, with FXCM US?

23 A. Well, you know, when I founded it,
24 there was only six of us and there were no other
25 employees, so we did all the, you know, all the

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2 Q. Was it in 2010?

3 A. Yes.

4 Q. Were you responsible for making the
5 final decision to take FXCM public?

6 A. The Board was and, you know, as
7 Chairman of the Board, I was part of that.

8 Q. Okay. And do you recall when FXCM's
9 initial registration statement was filed with the
10 SEC?

11 A. I don't recall the exact date. I
12 want to say probably around September of 2010,
13 maybe August, around that time.

14 Q. Okay. And did FXCM take any steps to
15 prepare the company for going public before the
16 registration statement was filed?

17 A. Yes.

18 Q. And in a broad sense, what were those
19 steps?

20 A. We made lots of, you know, lots of
21 corporate governance changes, lots of, you know,
22 different -- I don't recall now the -- this is
23 over ten years ago, but, you know, I remember
24 lots of changes.

25 Q. Do you remember what say a couple of

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2 every detail, but the main messages I did
3 approve.

4 Q. Okay. Thank you.

5 And looking at this page, in
6 particular, do you recall whether you reviewed
7 the main content -- the main body of text that's
8 shown here on this page?

9 A. Too long ago and way too much detail.
10 I have no idea. I don't recall.

11 Q. Is the -- okay.

12 Is the type of content shown on this
13 page something that you would have reviewed and
14 approved back in 2013?

15 A. Yes.

16 Q. Okay.

17 A. Every change, no, but like the main
18 -- again, main message, yes.

19 Q. Okay, I understand.

20 I'm going to direct you to the next
21 exhibit, which is -- I've lost it. I have to
22 pull this back up.

23 THE STENOGRAPHER: 30.

24 MR. BAKER: I think 30. We on number
25 30?

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2 A. Yes.

3 Q. Do you recall whether you helped to
4 review or approve the contents displayed in this
5 page?

6 A. If this is the FAQs, then probably
7 not. You know, maybe some parts, like the main,
8 you know, the big questions, yes, the most
9 important questions but not every little
10 question.

11 Q. Okay. And do you see any -- the
12 questions on here -- do you see any ones that you
13 would have been more likely to have reviewed than
14 others?

15 A. The first one, kind of the main
16 message why FXCM offer, you know -- sorry, this
17 is different.

18 No, sorry not the first one.

19 The question, for example, FXCM
20 dealing desk can see my stop, limits and entry
21 orders, or they want to trade against me, you
22 know, that -- those are the big questions that I
23 would approve.

24 Q. And the one that's bolded and
25 expanded, "If you can see my weighting orders

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2 (entry, stop and limit) with dealing desk
3 execution, why can't you see them with dealing
4 desk execution?" Is that a section that you
5 would have reviewed or approved the content for?

6 A. Yes.

7 Q. And the answer to that question, not
8 just the question itself, to be clear?

9 A. You want me to answer that question?

10 Q. No, no, I meant by -- would you have
11 been involved in the review or approval of the
12 answer to that question here --

13 A. Yes, yes.

14 Q. -- as opposed to the question itself?

15 A. Yes.

16 Q. I just wanted to clarify.

17 A. Yeah, when I say, I approved a
18 question, I approved the answer.

19 Q. Yeah, thank you. I just wanted to
20 make sure we had a clear record on that.

21 MR. BAKER: Okay. I'm about to move
22 into a different section. We've been going about
23 an hour. Do we want to take a break now or push
24 through? Either is fine with me.

25 MR. DAHAN: We can take a short

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2 Q. Was there a particular venture or
3 project that Mr. Dittami worked on while at FXCM?

4 A. Mr. Dittami was hired, essentially,
5 to help us figure out the problems we were having
6 -- to analyze data and help us figure out the
7 problems we were having with external liquidity
8 providers, other market makers and help fix those
9 issues. That was the reason he was...

10 Q. Sorry, you're trailing off at the end
11 there.

12 A. So the original purpose was for him
13 to do data analysis and to go figure out the --
14 why we were having problems with some of our --
15 many of our liquidity providers.

16 Q. And other than the sort of analysis
17 figuring out these problems, was there any other
18 project that Mr. Dittami worked on while he was
19 at FXCM?

20 A. And so, once we could not filing out
21 -- once we analyzed the problems and the issues
22 the other people were having, we tried to get
23 them to fix it and when they would not
24 sufficiently fix them, we hired Mr. Dittami to
25 potentially look into basically setting up a

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2 market making operation, you know, to fix it.

3 Q. And that "operation" was within FXCM?

4 A. Yeah. So, as part of the debate that
5 we were ongoing that if we could not fix these
6 problems, that we would have to, you know, we
7 would have to -- we would have to end the no
8 dealing desk execution model because we would
9 have withdraw from it and then, you know, we
10 would need to substitute it with something. And
11 so Mr. Dittami would be -- would do that.

12 Q. And the market making operation, did
13 that have a name that it was referred to at FXCM?

14 A. I don't -- I don't recall exactly,
15 EES or one of those types of things.

16 Q. "EES" you said?

17 A. Yeah. I don't recall the exact name.
18 I know when I see it.

19 Q. Okay. And, to your knowledge, were
20 there any other names used at FXCM to refer to
21 Mr. Dittami's market making operation?

22 MR. DAHAN: Objection to form.

23 A. I don't recall the terminology. You
24 know, I recall the substance, not the
25 terminology.

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2 Q. Okay. Did Mr. Dittami report to you
3 with respect to his work on this market making
4 operation?

5 A. He mostly worked with Mr. Ahdout.

6 Q. Did he report to you about his work?

7 A. He sent me updates.

8 Q. Was that on a regular basis?

9 A. Yes.

10 Q. And did you speak with Mr. Ahdout on
11 a regular basis about Mr. Dittami's project?

12 A. Yes.

13 Q. And while Mr. Dittami was at FXCM,
14 were you generally aware of his work and progress
15 on this operation?

16 A. Not day to day but, you know,
17 overall, yes.

18 Q. Okay. About how often would you
19 discuss Mr. Dittami's operation while he was at
20 FXCM?

21 A. It could be as little as once a month
22 as much as, you know, once a week, you know,
23 maybe twice a week. I mean, it was a big company
24 with lots of stuff to do. We were, you know --
25 you could never do one thing for too long.

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2 and then we wanted to keep that going and that
3 was the emergency of the day. And so I
4 definitely went into an emergency and I would
5 spend more time on it. When it was not, I would
6 spend less time on it.

7 Q. Okay. And just so the record is
8 clear, were you saying pain point or pinpoint?

9 A. Pain.

10 Q. Pain?

11 A. Yeah, pain. Like back pain, yeah.

12 Q. Thank you.

13 And when you say that was the
14 emergency of the day, are you referring to Mr.
15 Dittami's project?

16 A. No. He was one of the fixes. The
17 emergency of the day was that external -- that
18 external execution was not working as well as it
19 should be working.

20 Q. Understood.

21 While Mr. Dittami was at FXCM, did
22 you have any expectation that his market making
23 operation would generate profits for FXCM?

24 MR. DAHAN: Objection to form.

25 A. There was an -- to put this into

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perspective, there was an argument at FXCM whether to withdraw from -- right, some of the founders and some of the board members wanted to withdraw from external execution and go back to being -- to doing internal market making. If they win the argument, they want Mr. Dittami to carry out a major piece of that, okay.

There was another side to that debate and different people wanted to persevere through external execution and not, you know, take it in-house, not withdraw from it.

So, obviously, if the side that ultimate -- the side that ultimately won is the side that said, we're continuing with external execution, and that's why we, you know -- you know, discontinued Mr. Dittami's project. But had we had the other side prevail and we decided to discontinue external execution and move back to market making, then we would have the expectation that Mr. Dittami's project would make money, yes.

Q. And by "make money," is that through trading profits?

A. Correct.

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2 Q. Okay. When FXCM hired Mr. Dittami,
3 did it enter into an employment agreement with
4 him?

5 A. Yes.

6 Q. What was your role with respect to
7 FXCM hiring Mr. Dittami?

8 A. I approved it.

9 Q. Were you involved at any other point
10 in the hiring process?

11 A. I interviewed him.

12 Q. Were you involved in negotiating the
13 terms of Mr. Dittami's employment agreement?

14 A. Mr. Ahdout did all the terms.

15 Q. Did Mr. Ahdout inform you or keep you
16 aware of major terms that went into Mr. Dittami's
17 employment agreement?

18 A. Yes.

19 Q. I'm going to introduce another
20 exhibit. These things might take a little bit
21 longer because they were not preloaded, so bear
22 with me.

23 (Deposition Exhibit 31, Employment
24 Agreement 9/4/09 between Forex Capital Markets
25 LLC and John Dittami GLBR_00110697 to

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2 A. We had no idea to do, that's why we
3 were testing and we were experimenting phase by
4 phase, client by client.

5 Q. Did you have any expectation as to
6 the order of magnitude of trading profits that it
7 might accomplish when Mr. Dittami was first hired
8 in terms of millions, tens of millions,
9 thousands?

10 A. Millions.

11 Q. Okay. In going back to Page 1 under
12 Section 2, do you see a reference to a \$3 million
13 initial investment?

14 A. Page 2.

15 Q. Page 1, Section 2.

16 A. Oh, yes, okay.

17 Q. Did FXCM -- sorry?

18 A. I see it, yes.

19 Q. Okay. Did FXCM provide any of that
20 initial investment to Mr. Dittami?

21 MR. DAHAN: Objection. There's no
22 reference here that it's to Mr. Dittami. Please
23 come on stop. It says, "to the venture." Can
24 you -- can you --

25 MR. BAKER: Okay. I'll --

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2 turning up flow to get some real P&L."

3 Do you see that?

4 A. Sorry, where is this?

5 Q. Starts at the very last couple of
6 words on Page 1.

7 A. Yes.

8 Q. Okay. And was it your understanding
9 that at this point Mr. Dittami was running test
10 trades with the market making operation?

11 A. Yes. I mean, that's the subject of
12 the e-mail.

13 Q. Yes. And was it your understanding
14 that Mr. Dittami was using these test trades to
15 test the trading systems that he was working on
16 for scaled up trading that he would undertake
17 with Effex?

18 MR. DAHAN: Objection.

19 A. Yes.

20 Q. And did you view Mr. Dittami's
21 trading as Effex as a continuation of his work
22 developing the venture at FXCM?

23 A. It was not the same thing because we
24 would not be transferring -- you know, the
25 original intent was to move off of external

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2 execution and move -- you know, potentially have
3 the option of moving back to a dealing desk
4 model. And so Mr. Dittami -- we would then have
5 routed more trades to Mr. Dittami. Where -- to
6 the venture, but because we decided to end that
7 venture and continue with external execution,
8 Effex Capital would have to compete with the
9 other external providers. So it would be -- it's
10 a different operation.

11 But we needed an outside entity that
12 would come to the current mix of liquidity
13 providers and provide more competition and
14 provide, you know, a higher amount of quality
15 control because we were having similar problems
16 with the existing liquidity providers.

17 Q. Okay. If you move down -- this is on
18 Page 2, the second full paragraph beginning with,
19 "we are."

20 And Mr. Dittami writes, "We are next
21 in line on update to win ties on the tight pairs
22 so that we can ask USD/JPY and EUR/USD."

23 Do you see that?

24 A. Sorry, which page are you on?

25 Q. Page 2. It's the second full

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2 them the most and therefore would cause, you
3 know, customers to actually pay, you know, too
4 much, you know, and there was -- you know, it
5 was, essentially, a misleading best price. It
6 was not real. Without being a low rejection
7 rate, the best price is not really the best
8 price.

9 Q. Okay.

10 A. It's just a bait and switch.

11 Q. And were you involved in determining
12 -- or in setting the system for which liquidity
13 providers would win ties?

14 A. Yes. So, as you can see here, we at
15 times gave advantages to Dresdner Bank, to
16 Citibank, Goldman Sachs, to BNP, to other
17 institutions. They just -- we experimented, you
18 know, prior to Mr. Dittami with lots of
19 different, you know, institutions in trying to
20 improve the trading operation for -- for our
21 clients. It's just we're not compelling enough
22 of an improvement.

23 Q. And once Effex started trading with
24 FXCM, was there a time when Effex did not have
25 the ability to win ties?

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2 A. I don't recall. I don't recall exact
3 specifics, if there was instances. I do recall
4 the fact that we, you know, sent a scorecard to
5 all our liquidity providers and, you know, if you
6 rated too low, you were booted from the FXCM and
7 we did boot some liquidity providers off of the
8 mix or de-prioritized them more so. And we also,
9 you know, obviously, prioritized those who did
10 better.

11 Effex was always by far and away the
12 best performer on all the metrics and there was a
13 whole slew of metrics. And, you know, that's
14 why, you know, over the years from 2010 to 2015,
15 '14, you know, our trading spreads, you know,
16 declined by 90 percent, right. So the
17 improvement to customers was pretty significant,
18 almost 90 percent.

19 Q. And in the time period from 2010 to
20 let's say 2014 -- through 2014, is it fair to say
21 that Effex would win ties majority of the time?

22 A. Yes.

23 Q. Was it 90 percent of the time or more
24 or higher?

25 A. I don't recall the specifics.

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2 Q. Okay. In this section of your
3 e-mail, were you talking about FXCM's retail
4 trading?

5 A. Correct. As you can see from
6 Paragraph 2, there's the problems I was talking
7 about -- Point 2. Problems I was talking about
8 is that the slow banks basically would -- you
9 know, the metrics, basically, were terrible and
10 were costing our clients, you know, a lot of
11 money.

12 So we wanted -- we had a lot of
13 liquidity providers, over 15 at the time. And we
14 wanted to, you know, the ones that were causing
15 problems for clients but could not do that
16 without sacrificing spread competition unless we
17 had Effex up and running tightening up spreads,
18 you know, and making sure that our competition is
19 still significant.

20 Q. Okay. And in this Paragraph 2 of
21 this section, were you instructing the people on
22 your e-mail to stop trades from going to certain
23 banks or to severely handicap the ability of
24 those banks to win trades by adding higher
25 markups to their prices?

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2 A. I don't.

3 Q. Okay. Do you recall if it was around
4 the time that Mr. Dittami left FXCM?

5 A. No. I'm pretty sure I saw this -- I
6 don't -- honestly, I don't recall when I saw it.
7 I know, obviously, that, you know -- because I
8 ultimately, you know, as a Board, you know, made
9 the decision not to do this. So, you know, I
10 knew this was happening. So, I mean, I don't
11 need a letter to do that.

12 Q. Okay. And in this letter. Mr.
13 Dittami writes in the last paragraph, "It is the
14 understanding of both parties to enter into a
15 license agreement on economic terms similar to
16 the employment agreement."

17 Do you see that?

18 A. Yes.

19 Q. And this letter is also signed by
20 Mr. Ahdout on behalf of FXCM US?

21 A. Yes.

22 Q. Were you aware of the understanding
23 that Mr. Dittami references in this letter?

24 A. Yes.

25 Q. And did you have any conversations

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2 with Mr. Dittami about that understanding?

3 A. Yes. So, you know, Mr. Dittami was
4 going to open his own firm and is going to be,
5 you know, taking on FXCM plus other clients.
6 And, eventually, he had over 30 clients, I
7 believe. Obviously, one of the big ones was
8 FXCM.

9 But the payment for flow that we
10 would get, right, that's -- kind of the initial
11 thought was that it would mimic this employment
12 agreement. It's not how we ended it. It's not
13 what we decided at the end, but that was the
14 initial thing.

15 Q. And when you say the payment for flow
16 would "mimic" the employment agreement, what part
17 of the employment agreement, in particular?

18 A. The P&L split of FXCM's trading of
19 FXCM's flow, right, but not, obviously, of flow
20 outside of FXCM.

21 Q. Understood.

22 So that's the 70/30 split that we
23 looked at earlier?

24 A. Yes.

25 Q. And did you have any conversations

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2 A. I can see it.

3 Q. Okay. And please take a minute to
4 review. I'm, generally, just going to be asking
5 you some general questions about this. And --
6 but take whatever time you need.

7 MR. BAKER: For the record,
8 Exhibit 36 is Bate stamped E Capital 4.

9 Q. Mr. Niv, just let me know when you're
10 ready.

11 A. I am ready.

12 Q. Okay. Do you recognize this
13 document?

14 A. Yes.

15 Q. And is this a Services Agreement
16 between Effex and FXCM US?

17 A. Yes.

18 Q. And that's dated the effective date
19 of March 1st, 2010?

20 A. Correct.

21 Q. Do you recall when you first saw this
22 agreement?

23 A. No. But I approved this agreement,
24 so I definitely saw it.

25 Q. And was that -- so around -- before

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2 A. Yes.

3 Q. Okay. Please take a minute to review
4 this document.

5 MR. BAKER: For the record,
6 Exhibit 37 is E Capital 50, 5-0.

7 Q. Mr. Niv, let me know when you've had
8 a minute to review.

9 A. I know this agreement, you know.
10 Yeah, I reviewed, yeah.

11 Q. So do you recognize this document?

12 A. Yes.

13 Q. And is this an Option Agreement
14 between Mr. Dittami and FXCM US dated April 14,
15 2010?

16 A. This is -- this is an agreement that
17 Mr. Ahdout and Mr. Dittami signed, correct.

18 Q. Okay. And the agreement is dated the
19 same day as Mr. Dittami left FXCM?

20 A. Yeah.

21 Q. When did you first see this document?

22 A. I don't recall the date.

23 Q. Was it sometime around when it was
24 signed?

25 A. I would imagine so, yeah.

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2 at people, you know, that's why we have lawyers
3 internally. That's their job.

4 Q. Were you aware of anything in writing
5 that rendered this agreement "null and void"?

6 A. No, I don't do the details.

7 Q. Looking at Paragraph 1 of this
8 document about halfway down the first page, is it
9 fair to say --

10 A. Yes.

11 Q. Sorry. Is it fair to say that under
12 this agreement, FXCM had the right to purchase a
13 70 percent interest in Effex for \$1?

14 A. Correct.

15 Q. Under the second whereas clause, it's
16 the third paragraph from the top, it says, "FXCM
17 has loaned to Effex the sum of \$2 million
18 pursuant to that secured promissory note dated
19 the date here of (the note) on terms more
20 favorable than Dittami would have obtained in an
21 arm's length transaction."

22 Do you see that?

23 A. Yes.

24 Q. Is it true that FXCM loaned Effex
25 \$2 million?

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2 A. No. So FXCM -- I mean, technically
3 semi-true but not really. FXCM, essentially,
4 collateralized the prime brokerage account to
5 enable Mr. Dittami to get prime brokerage access
6 to the FX market, which he would not have
7 otherwise been able to do as an independent
8 institution. That is a service FXCM did for
9 others as well.

10 You know, this was something that we
11 -- I mean, he paid it after a few months and he
12 got his own relationships. But this is in the
13 beginning he had to, you know, to get going, we
14 had to help him get going, which we did for a
15 number of people in similar situations in the
16 high frequency trading space like, for example,
17 Lucid Markets, which we did end up buying, you
18 know, for -- you know, we bought 50 percent,
19 which I believe was 180 or \$150 million in 2013.

20 But in 2009, 2010, we did help him
21 get going with the exact same arrangement, this
22 prime brokerage arrangement.

23 Q. Okay. And is it fair to say that you
24 know if this wasn't a loan, this was FXCM
25 allowing Effex to use \$2 million as collateral

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2 which Effex then paid back you said after a few
3 months?

4 A. Correct.

5 Q. Did Effex pay any interest on this
6 amount of money?

7 A. I don't know the specifics.

8 Q. Would you agree that the terms of
9 that say financial transaction were more
10 favorable than for Mr. Dittami than he would have
11 been able to obtain in an arm's length
12 transaction?

13 MR. DAHAN: Objection to form.

14 A. It depends on -- I mean, it really
15 depends on how much somebody else believed that
16 they wanted his business. I mean, it's clearly
17 we would have done that -- high frequency trading
18 space in those times was a very attractive, you
19 know, business. And Lucid, you know, and other
20 firms, you know, were making a lot of money by --
21 arbitrage was in between financial institution --
22 exchanges was very easy -- easier at the time.
23 It was not as competitive a business. This was
24 the business that everybody was trying to get
25 into and, you know, we as well. So we, clearly,

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2 I'm going to mostly just ask you some general
3 questions here, but let me know when you're
4 ready.

5 MR. BAKER: For the record,
6 Exhibit 39 is E Capital 52.

7 A. Okay, I'm ready.

8 Q. Okay. Mr. Niv, do you recognize this
9 document?

10 A. This looks like the Services
11 Agreement.

12 Q. And is that a Services Agreement
13 between Effex and FXCM Holdings with an effective
14 date of May 1st, 2010?

15 A. Yes.

16 Q. And have you seen this document
17 before?

18 A. I don't recall. No, sorry. Of
19 course, I've seen this document before. That's
20 -- yes. When, I don't recall.

21 Q. Thank you. That was going to be my
22 next question.

23 Do you remember if you saw it around
24 the time that it was signed?

25 A. From memory, I can't tell you. But,

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2 I mean, it would make -- it would be logical
3 sense that this document would not be signed
4 without me.

5 Q. Is that without your review, or did
6 you have some other involvement with this
7 document?

8 A. Review, permission.

9 Q. Okay. And did you ever refer to this
10 agreement by anything -- by any name other than
11 services agreement?

12 A. I don't recall.

13 Q. And did you ever hear anyone from
14 FXCM refer to this agreement as anything other
15 than a services agreement?

16 A. I don't recall either.

17 Q. Were you aware that under this
18 agreement Effex was agreeing to pay FXCM Holdings
19 a fee of \$21 per million units of trading volume?

20 A. Yes.

21 Q. Were you aware that -- well, here --
22 I guess, let me step back.

23 On the first page under "Recitals"
24 Paragraph C, it states, "Effex and Forex Capital
25 Markets LLC previously entered into a services

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2 were you aware of any other payments that FXCM
3 Holdings received from external sources as
4 opposed to subsidiaries?

5 A. FXCM Holdings primarily supposed to
6 be a -- then a shareholder entity that is to
7 concentrate share holdings, so it's not an
8 operational entity. It's really for -- I mean,
9 usually, most of the vendors that we sign with
10 Holdings are ones where we are paying them, not
11 they're paying us. But I'm not aware. I don't
12 recall the specifics.

13 You know, I just know that we
14 transitioned -- as we got more overseas
15 subsidiaries, it was impractical to have
16 different contracts with different subsidiaries
17 and it was easier to just put everything under
18 Holdings.

19 Q. I understand, but I think my question
20 was a little different.

21 My question is just if you are aware
22 of any payments other than those coming from
23 Effex that FXCM Holdings received directly?

24 A. Well, FXCM Holdings would get
25 upstreamed, you know, all the profits from -- or

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2 Q. Okay. And in those discussions,
3 generally, do you remember discussing other
4 structural alternatives besides pay for flow?

5 A. So, obviously, again, the original
6 concept was we were going to have 70/30 profit
7 share, you know. But, again, as I explained
8 previously, that is just not practical given the
9 reality of once he has his own firm and he's
10 taking other clients and that flow from Client A
11 is intermixed with flow from Client B, that's
12 just not possible -- excuse me -- to
13 differentiate between profits from Client A to
14 Client B.

15 And, you know, it is also, you know,
16 like I said, just something that, you know, just
17 -- and not practical really and not standard in
18 the industry. So that's why we -- initially, we
19 went through a this should be a profit share to
20 look like the employment agreement, because
21 that's a deal we already negotiated and worked
22 out, to that it's just not practical under him
23 having his own firm and, therefore, he has to
24 change into what we changed it to.

25 Q. Okay. And I think I understand what

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2 captured?

3 MR. DAHAN: When, Counsel? I mean,
4 we know that there's -- I mean, no mystery here.
5 We know there were different agreements,
6 amendments. So when? I mean, let's --

7 MR. BAKER: Yeah, I'm trying to think
8 how to clarify.

9 MR. DAHAN: Pick a time. Pick a time
10 period, that's all. We, obviously, know that's
11 not the case. (INAUDIBLE) So pick a time.

12 Q. Mr. Niv, when these services
13 agreement were first signed, was it your
14 understanding that the \$21 per million that Effex
15 would pay was based on all of the order flow that
16 Effex captured from FXCM?

17 A. Yes.

18 Q. And was there a time when that
19 changed?

20 A. Yes.

21 Q. When was that?

22 A. So, as time went on and this became a
23 big success and, you know, spreads, you know,
24 basically, narrowed by about 80 to 90 percent
25 over the next few years, particularly, spreads in

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1
2 euro/dollar and dollar/yen, you know, obviously,
3 it became -- you know, over time we had to make a
4 few changes and it became unattainable for them
5 to pay us more than a tiny fee because they just
6 weren't making, you know, that type of money.
7 So, obviously, all market makers, as you noted
8 previously, make less money on narrower spread
9 currencies. And as the spreads were narrowing,
10 you know, in like I said by significant amounts,
11 you -- they could not afford to pay us the
12 amounts that we initially signed for.

13 Q. Okay. And, I think, now maybe I
14 understand where the source of the confusion with
15 my original question.

16 So regardless of what the fee -- the
17 specific fee per million was at anytime, was it
18 your understanding that throughout the time that
19 Effex was paying FXCM for order flow that it was
20 paying for all order flow that Effex captured
21 from FXCM as opposed to segments of that order
22 flow?

23 A. I do not recall a hundred percent
24 everything because there were -- there may have
25 been some stuff that's not there that's excluded.

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2 A. Correct.

3 Q. And this is from \$21 per million to
4 \$16 per million?

5 A. Correct.

6 Q. Do you recall who wanted to change
7 the fee at this time?

8 A. John.

9 Q. And do you recall -- did he tell you
10 why?

11 MR. DAHAN: Objection, asked and
12 answered, 15 times today. I mean, do it again.

13 A. You know, again, over time spreads
14 contracted, right, and which is exactly what we
15 wanted to happen happened. You know, we wanted
16 spreads to go down. We wanted, right,
17 essentially, clients to have cheaper American
18 competitive price and that was happening. But as
19 that happens, that squeezes the, you know, the
20 market makers or the suppliers. They make less
21 money per trade and, therefore, they can pay less
22 money per trade. So that is the whole point
23 because we would get more trades and the bulk of
24 the money that FXCM made, you know, which is 97
25 or 96 percent, right, was from the markups which,

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2 know, like, again, we had lawyers in our
3 employment. That's what their job was. That
4 wasn't mine.

5 Q. And so the times that the rate that
6 Effex paid to FXCM did change, were you involved
7 in or aware of those discussions each time?

8 A. I would approve the change of rate,
9 yes. Again, big substantive issues like change
10 of rate I would approve.

11 Q. Okay.

12 A. That would probably be the only
13 thing. The only other issue would be the
14 benchmark conditions, right, under which this
15 thing agreed -- rests. So, you know, kind of we
16 obsessed over the -- we got frequent reports
17 about what the rejection rates are for all the
18 liquidity providers and we provided that to all
19 of them and so they can compare to one another.
20 We would -- you know, all of the, again, sort of
21 speed of reply, hold time speeds, the -- for each
22 maker, you know, performance, how much price
23 improvements we would receive, you know, not us,
24 clients would receive because of their
25 interaction, all of those metrics that are used

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2 answer the question.

3 A. It is market standard. This is what
4 we did, you know. This is what other providers
5 do.

6 MR. DAHAN: I mean --

7 MR. BAKER: Well, let me try to...

8 Q. So why did liquidity providers who
9 offered worse execution than Effex not have to
10 pay FXCM for order flow?

11 A. Because we never agreed -- because,
12 you know, to the -- we tried and failed with
13 giving them preferential access and that -- in
14 exchange for that improving the customer
15 experience. And so because they couldn't do it,
16 you know, there was no reason to do it. I'll
17 give you -- actually, let me -- I understand what
18 the confusion is.

19 These are mostly large financial
20 institutions. They would do this, you know, just
21 as you know Charles Schwab is doing that with
22 Citadel and Two Sigma and people like that
23 because that is what -- if you have substantial
24 order flow, right.

25 Now, we had a lot of different

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liquidity providers and if we did not have a preferential relationship, they would not get, you know, a large percentage of the order flow and -- but we tried to give it to them. We even before we had Effex and after. And they just, again, could not measure up, you know, would not be consistent enough in improving the experience. So Effex was just better at it.

Q. And so the connection was that Effex was better at it, at providing better execution and that is connected to them paying for order flow?

A. It is connected to them receiving preferential treatment.

Q. Is it connected to them paying for order flow?

A. And as part of receiving preferential treatment, they have to pay for order flow, yes, because they are receiving -- therefore, preferential treatment gives them a large portion of the order flow.

Q. So paying for order flow is not "preferential treatment" from Effex's perspective; is that right?

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A. Correct. It's the cost of doing business that is normal -- you know, if you went and said -- looked at all the retail stock brokers today and say, you know, where are they routing their orders to? They're not routing it to Stock Exchanges. They're routing it to specialist market makers and receiving payment for order flow. That is just standard market practice nowadays, not in futures, but it is in equities because in futures there's a monopoly venue of one exchange per instrument and, therefore, because of that monopolization, there is no -- you're not allowed to shop into different venues.

So futures brokers have to route to only one exchange, cannot route anywhere else, but equity brokers are allowed to route -- you know, again, meaning, you know, best execution standards, they're allowed to route to whatever venue they want. And they, generally speaking, you know, in 99 percent of the cases get payment for order flow for it. That is market standard and we modelled ourselves on that market standard.

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2 Q. But only with respect to Effex and
3 possibly BNP at this time; is that correct, with
4 respect to the payment order flows?

5 A. At this time, yes, because the other
6 discussions failed, you know. And these are
7 large institutions, they're not going to enter
8 this agreement without getting preferential
9 treatment and doing a substantial amount of more
10 business because this would then not be
11 sufficiently big enough for them to get into this
12 agreement.

13 You know, when Charles Schwab and
14 Ameritrade and Robin Hood are giving payment for
15 order flow, they're doing it to only a few
16 counterparties and, you know, who are each
17 getting a substantial piece of the share. That's
18 why there is that. When they route it to other
19 venues, they don't receive payment for order
20 flow.

21 Q. Okay. I think we can move on.

22 I'm going to introduce the next
23 exhibit.

24 (Deposition Exhibit 43, Amendment to
25 Service Agreement E Capital-000060, was marked

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the decision -- I made decision to terminate for all the, you know, for all of the entities.

Q. Understood.

Did the NFA at any point investigate FXCM's relationship with Effex?

A. Yes.

Q. And when did you first become aware of the NFA's investigation into FXCM's relationship with Effex?

A. I do not recall exact dates. But I do recall making a presentation answering questions in 2013 at NFA offices in Chicago. But I'm sure we answered questions by e-mail and by phone even before that. Obviously, the NFA gets -- all the regulators, basically, get -- all the regulated entities have a trading reporting system so they get to see all the trades that our clients do, with who they do it with and, you know, what prices they got. And they will routinely send us an inquiry saying, oh, we saw this type of trade, this event occurred, please explain, right. So we would get that on a routine basis and, you know, they inquired about Effex because Effex came up, obviously, in that

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2 -- in the regulatory -- in that regulatory
3 reporting system.

4 Q. And did the CFTC investigate FXCM's
5 relationship with Effex?

6 A. I believe so on a much later date. I
7 don't recall when.

8 Q. Do you remember what year 2013, 2014?

9 A. It's all a blur and I don't recall.

10 Q. Do you recall if you first became
11 aware of the CFTC investigation before FXCM
12 stopped taking order flow payments from Effex?

13 A. The NFA one, I know that's the case.
14 The CFTC one, I don't -- I'm not sure.

15 Q. Was the NFA investigation a factor in
16 your decision for FXCM to start -- to stop
17 charging Effex for order flow?

18 A. No, it was the determination for the
19 -- it was the determination of the UK authorities
20 not to do it, which then we figured this is going
21 to, you know, become some best practices thing
22 that is likely to happen anyway and might as well
23 get ahead of it and terminate it because clearly
24 the regulators don't like it. But it is -- when
25 the UK regulator said, no -- because, again, they

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2 were investigating, you know, pieces of it, but,
3 you know, this is standard practice and this was
4 something that everybody does and, by the way,
5 still do outside of the UK. You have --

6 Q. And --

7 A. -- wrong and this did not become
8 Global best practice. It is just a UK best
9 practice.

10 Q. So understanding that the UK
11 regulator -- their decision was the impetus for
12 these discussions in this decision, did the fact
13 that the NFA was investigating FXCM's
14 relationship with Effex play any factor in the
15 decision to stop order flow payments from Effex?

16 MR. DAHAN: Asked and answered.

17 Q. You can answer.

18 A. I mean, that's what I just explained.
19 It is an issue of, we understand if from -- from
20 an optics perspective, this -- the regulators did
21 not like the practice, yet, you know, the
22 regulators allow the practice, you know, and the
23 regulators, you know, absolutely, you know, still
24 -- again, this practice continues at all the
25 major brokerage firms today anyway.

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2 Q. And --

3 A. The NFA and CFTC do not allow this in
4 the futures, because in futures there's no
5 practical way to do it and so they're not
6 familiar with it like the SEC is familiar with it
7 in equities but -- because of the monopoly status
8 of our futures exchanges operate. But in
9 equities where there's 40 plus venues and there's
10 real competition for trades, there is absolute
11 payment for order flow.

12 So the -- you know, Effex is like
13 equities. There is lots of venue competition,
14 okay, and therefore there's payment for order
15 flow. So we thought this was fine. They did not
16 and this clearly played some role in our decision
17 that, you know, we thought eventually the US
18 regulators would reach the same conclusion that
19 the UK regulators did, okay. They never did, but
20 that's what we thought they would.

21 Q. Okay. And you said, "from an optics
22 perspective" the regulators did not like this
23 practice of payments for order flow.

24 Are you referring to the NFA as one
25 of those regulators?

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2 A. Yes.

3 Q. And what was the basis for saying
4 that the NFA or other regulators didn't like the
5 optics of payments for order flow?

6 A. The regulators because they don't
7 understand how our market -- how, basically,
8 trading actually works, okay, never bother to
9 take the time to figure this out, are like most
10 normal people who don't drown them in nuance in
11 how trading relationships work and they should
12 not.

13 And when they hear that somebody is
14 receiving payment, right, for routing an order,
15 they say, well, that must be untoward thing,
16 right, just because it logically makes sense that
17 if you're paying for something that you're
18 charging extra, quote, unquote, to the customer.
19 Where every study shows that this is not true,
20 right, and it is, you know, exactly the opposite,
21 you know, if you look at scientifically speaking
22 and the SEC has a subcommittee on best execution
23 -- sorry, on payment for order flow and a
24 committee on execution and a subcommittee for
25 order flow and study after study shows that, you

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2 what that means. Objection.

3 Q. You can answer.

4 A. You mean define exactly what that --
5 like --

6 Q. Yeah, sure.

7 A. You mean --

8 Q. Yeah, I can try to tighten that up.

9 Did the nature of either the NFA or
10 CFTC investigations change at some point between
11 when they were first started and November 2015?

12 A. Yes, so the NFA investigated and then
13 dropped and, you know, the investigation -- and
14 then the CFTC -- they referred to the CFTC. CFTC
15 investigated and dropped, you know, that we
16 didn't hear from them for a few years, both of
17 them.

18 And then post the Swiss National Bank
19 event that happened to FXCM in 2015 where FXCM,
20 you know, lost a lot of money, the CFTC and NFA,
21 you know, decided to revive -- not "revive."
22 They filed a case against us on the SNB stuff and
23 -- if I recall correctly, something along those
24 lines. And somewhere time after that they
25 restarted this too.

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2 Q. Do you recall if -- when you say,
3 "they restarted this too," are you referring to
4 the investigations of the relationship between
5 FXCM and Effex?

6 A. Correct.

7 Q. And do you recall if they if the NFA
8 and CFTC restarted those investigations in 2015
9 between the SNB event in January 2015 and
10 November 2015?

11 A. I don't recall the exact dates. But
12 I believe it was in '16 sometime, but I don't
13 remember.

14 Q. Okay. This might be a good time for
15 a break. We've been going --

16 MR. DAHAN: Okay. How we doing on
17 the deposition?

18 THE VIDEOGRAPHER: Off the record
19 2:13.

20 (Recess taken 2:13 to 2:24 p.m.)

21 THE VIDEOGRAPHER: We're on the
22 record at 2:24.

23 Q. Welcome back, Mr. Niv.

24 I've introduced the next document,
25 which is Exhibit 47.

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2 deal we had with BNP. We had numerous deals.
3 There's a P1, P2, P3 and P3 is the payment for
4 order flow.

5 Q. Okay. So it refers to a deal as
6 opposed to some sort of set of transactions or
7 streams or something else?

8 A. Yeah. It's an arrange --
9 essentially, this was for a payment for order
10 flow arrangement where -- again, it's a long time
11 ago. So I believe that P2 was -- we sold them
12 data. That's the side data that's referred to
13 above.

14 Q. Okay.

15 A. Which they used for internal hedge
16 fund to trade money. This is a different team of
17 BNP that's making markets to us.

18 Q. Okay. And that was my next question.

19 So BNP was a liquidity provider for
20 FXCM at this time?

21 A. Correct.

22 Q. And was BNP in this P3 deal paying
23 for order flow for FXCM's retail customers?

24 A. I know they -- we did a deal with
25 them mostly on institutional clients. I don't

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2 recall if it ever was intended to go for other
3 things but the -- it just was never successful on
4 a large scale.

5 Q. Do you recall if BNP ever paid FXCM
6 either in this deal or at any point for order
7 flow on -- for retail order flow?

8 A. I don't recall. I don't believe so.
9 I don't recall. I don't believe they ever went
10 -- they ever -- they were using institutional
11 clients as kind of a test case. I don't believe
12 this was -- we ever made it out of this test
13 case.

14 Q. Okay. And in the same e-mail we just
15 looked at. The last sentence you write, "It's
16 tiny compared to Dittami."

17 Did you mean that the amount BNP paid
18 FXCM for order flow in the P3 deal was "tiny"
19 compared to the amount that Effex was paying FXCM
20 for order flow at this time?

21 A. Yes, because it was more complicated
22 and they largely lost money doing it and,
23 therefore, you know, our agreement says they
24 wouldn't have to pay us money if they wouldn't
25 make money.

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2 A. The exact -- we had so many at that
3 time because, clearly, this was an emergency
4 time. So I do not recall this specific meeting.
5 But I know the subject of what we discussed at
6 all these meetings.

7 Q. Okay. If you go down to Page 2 about
8 halfway through the first full paragraph and in
9 there the minutes here say that you discussed an
10 execution study with the Board.

11 Do you see that?

12 A. Yes.

13 Q. And do you recall discussing an
14 execution study with the Board?

15 A. Yes.

16 Q. Was this the same study that you
17 referred to earlier about improvements in
18 execution?

19 A. Correct. This was, obviously, a
20 study that we prepared way before 2016 and we
21 already presented it to foreign regulators, to
22 the US regulators. This is just in the -- and
23 the Board knew about. This is just reiterating
24 it.

25 Q. Did FXCM ever publish this study

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2 anywhere?

3 A. Yes.

4 Q. Where?

5 A. So we published it on our website and
6 the NFA called 2 minutes -- like 20 minutes later
7 literally and told us to take it down, because it
8 was disparaging the CME, because we compared our
9 execution to the execution on CME, UBS and
10 Reuters and CME is their favorite child. So they
11 decided this is no good because they're -- again,
12 the NFA is the National Futures Association.
13 When it was mandated by Congress in 2000 to
14 oversee -- the retail FX 2 is the futures
15 association and, therefore, they did not want to
16 bias the futures exchange, which was on their
17 board, et cetera, et cetera.

18 So they told us to take it down. We
19 did publish the study on our foreign websites
20 later and they initially took us to take it out
21 of the foreign websites too.

22 But we said, you kind of don't have
23 jurisdiction over that. And we published this,
24 you know, this study. And they're not allowed to
25 tell us not to publish because their rules state

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1 writing from whom. But, obviously, we have not
2 had any foreign regulator action, you know, on
3 this topic whatsoever. And we, clearly, you
4 know, in -- for past issues if the US fined us
5 for something, we would get -- you know, the
6 other regulators would be like where is our --
7 we, basically, the same violation here, so, you
8 know, if it's, you know, if it's the same
9 violation, we want, you know, a fine too. I
10 mean, this was not the case here.

11
12 Q. Okay. Did you ever talk to the CFTC
13 about the execution study?

14 A. Yes, we did a presentation for them.
15 And which is why, again, initially they dropped
16 their stuff, like, we thought we made them go
17 away because of all of this stuff. They only
18 came back -- the CFTC did drop -- basically, drop
19 the case and they went radio silent for a long
20 time until the NFA, basically, came to us and the
21 NFA because it doesn't have the, you know, the
22 burden of the US Constitution and federal judge
23 and they just get to have their own courts,
24 that's their own employees and, you know, panel
25 that, you know, for some mysterious reason is a

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2 Q. Okay. Was Effex one of the liquidity
3 providers that terminated its relationship with
4 FXCM in February 2017?

5 A. I don't recall the exact date, but
6 FXCM terminated Effex Capital I don't recall
7 when. But sometime around this time or a little
8 before to, basically --

9 MR. BAKER: Hello?

10 A. -- basically, cut off all
11 relationship.

12 Q. Okay. I think I missed -- the audio
13 cut out for a good amount of your answer there.

14 A. Sorry, so FXCM terminated --

15 Q. (INAUDIBLE DUE TO CROSS-TALK.)

16 A. Can you hear me now?

17 MR. DAHAN: Yeah, we can hear you.

18 Q. Yeah, yeah, yeah.

19 A. So FXCM terminated Effex Capital I
20 don't recall when but I -- to the best of my
21 recollection, it was before this date. But I --
22 it's around this date. It's either before or
23 slightly after, but it's around this date. And
24 that was a decision that FXCM made.

25 Q. Was that after the NFA and CFTC

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2 settlements?

3 MR. DAHAN: Objection. I think he
4 just said he doesn't know but...

5 A. I don't recall. I mean, obviously,
6 that's the record. We have records of that so...

7 Q. And were you a part of the decision
8 to terminate Effex as a liquidity provider?

9 A. Yes.

10 Q. What was the basis for that decision?

11 A. You know, regulatory pressure.

12 Q. Do you know if Effex is still in
13 operation today?

14 A. No, because when this press release
15 came out, their other clients left them also and
16 a lot of that counterparties cut them off. Prime
17 broker cut them off. So they, basically, are out
18 of business completely.

19 Q. Did the NFA or CFTC settlements
20 require that you leave FXCM entirely?

21 A. I think so.

22 Q. Not just as CEO but leave the
23 company?

24 A. I think -- well, okay, the NFA and
25 CFTC settlement applies really only to the US

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C E R T I F I C A T E O F R E P O R T E R

I, SILVIA P. WAGE, a Certified Shorthand Reporter, Certified Realtime Reporter and Registered Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause; that said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision; that before completion of the deposition, review of the transcript [X] was [] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.


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